

DECISION MEMORANDUM

TO: COMMISSIONER KEMPTON
COMMISSIONER SMITH
COMMISSIONER REDFORD
COMMISSION SECRETARY
COMMISSION STAFF
LEGAL

FROM: NEIL PRICE
DEPUTY ATTORNEY GENERAL

DATE: FEBRUARY 5, 2010

SUBJECT: APPLICATION OF TIME WARNER CABLE INFORMATION
SERVICES (IDAHO), LLC FOR A CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY, CASE NO. TIM-T-08-01

On November 14, 2008, Time Warner Cable Information Services (Idaho), LLC (“TWCIS” or “Company”) filed an Application for a Certificate of Public Convenience and Necessity (CPCN) pursuant to *Idaho Code* §§ 61-526 through 528, IDAPA 31.01.01.111 and Commission Order No. 26665 to provide competitive facilities-based local and interexchange telecommunications services within the State of Idaho. Staff and representatives of TWCIS entered into a prolonged period of discussions regarding the Company’s initial Application. On November 14, 2009, the Company filed a supplement to its Application.

On December 4, 2009, the Commission issued a Notice of Application and Modified Procedure. Thereafter, Commission Staff was the only party to submit written comments regarding TWCIS’ Application. Subsequently, Staff and representatives of the Company entered into another series of discussions during which the parties agreed that TWCIS would be permitted to issue a written reply to Staff’s comments. On January 29, 2010, TWCIS submitted a written response to Staff’s comments.

THE APPLICATION AND SUPPLEMENT

TWCIS is a Delaware corporation and lists its principal place of business as 290 Harbor Drive, Stamford, Connecticut 06902-8700. *Application* at 2. TWCIS is registered with the Idaho Secretary of State as a foreign limited liability company and lists CT Corporation System, 300 N. Sixth Street, Boise, Idaho 83702, as its Idaho registered agent for service. *Id.* In

its Application, TWCIS states that it is a “competitive telecommunications company” offering “facilities-based wholesale and retail intrastate telecommunications services” to “commercial and wholesale customers statewide.” *Id.* at 2, 5.

TWCIS seeks authority to provide “retail and wholesale facilities-based intrastate telecommunications services to commercial customers in all existing telephone exchanges in the state of Idaho.” *Id.* at 6. The Company will utilize the facilities owned by its cable affiliate, as appropriate. *Id.* at 5. The Application also reveals that the Company has not yet identified all of the facilities required for its services, “as the architecture will depend upon future customer location, customer demand and the outcome of interconnection agreement (“ICA”) negotiation with incumbent local exchange carriers (“ILECs”).” *Id.* at 5-6. TWCIS disclosed in its Application that it plans to enter into ICAs with Idaho ILECs, Verizon and Qwest. *Id.* at 7.

In the supplement to its Application, TWCIS reiterated that its “Local Interconnection Service, described in Section 3.3 of its proposed tariff . . . falls within the parameters of” the *Idaho Code* § 62-603(1) definition of “basic local exchange service.” *Supplement to Application* at 4-5. The Company also emphasized that granting a CPCN “will be consistent with the competition objectives embodied in federal and state law. . . .” *Id.* at 11

STAFF COMMENTS AND RECOMMENDATION

Staff reviewed TWCIS’s Application and supplement and recommends that the Commission deny the Company’s request for a CPCN. Staff Comments at 7. Staff remarked that TWCIS is a “wholesale provider” of telecommunications service “to retail companies and not to the public or end users.” *Id.* at 4. Accordingly, Staff does not believe that TWCIS offers “telephone service,” as the term is defined in *Idaho Code* §§ 61-121(2) or 62-603(13). *Id.* “Because the Company does not offer telephone service, it then cannot be considered a ‘telephone corporation’ in accordance with that definition in *Idaho Code* § 61-121(1) or 61-603(14).” *Id.*

Staff then went on to address substantive portions of the Company’s CPCN Application. Staff agrees that TWCIS’ Application provided all of the requisite information for a CPCN as set out in Commission Order No. 26665. *Id.* However, Staff disputed TWCIS’ assertion that the Company will offer “‘a form of basic local exchange service.’” *Id.* at 5 (*quoting* TWCIS Application at 4). Staff believes that “providing service to a company that is going to provide service to residential and small business customers” does not meet the statutory

definition of “basic local exchange service,” as the term is defined in *Idaho Code* § 62-603(1). *Id.* at 5. It is Staff’s position that telecommunications service providers, such as TWCIS, who offer something other than basic local exchange service, are exempt from the Commission’s CPCN process. *Id.* at 6.

Staff maintains that denying TWCIS’ Application cannot reasonably be construed as a “barrier to entry” into the Idaho market. *Id.* Staff noted that “Idaho statutes allow easier entry into the market” than the federal Communications Act of 1934 (“federal Act”). *Id.* Staff’s interpretation of the Commission’s authority regarding the issuance of a CPCN to wholesale providers would specifically exempt TWCIS from a state regulatory process. *Id.* Staff is therefore incredulous as to how such a permissive interpretation could be viewed as either a barrier to entry or otherwise contrary to the policy objectives favoring entry by facilities-based competitors such as TWCIS. *Id.*

TWCIS REPLY COMMENTS

TWCIS’ reply comments attempt to rebut Staff’s position that the Company is specifically exempted from the Idaho CPCN process. First, TWCIS assures the Commission that it is not seeking additional regulation by applying for a CPCN in Idaho. TWCIS Reply Comments at 2. To the contrary, “TWCIS is seeking a CPCN because, incumbent LECs need not, therefore choose not to interconnect with entities that do not hold a CPCN granted by the relevant state commissions.” *Id.* at 3. Competitive carriers without a CPCN are also disadvantaged in that they often lack “access to telephone numbers and connections with 911 public service answering points (“PSAPs”).” *Id.* According to TWCIS, a rejection of its Application would have the practical effect of barring the Company from providing local exchange services. *Id.* The Company believes that such an outcome would be contrary to the public interest and violate federal and state law. *Id.*

In support of its conclusion that the “Idaho Code does not preclude the grant of a CPCN to TWCIS,” TWCIS references the Commission’s “broad authority under the Idaho Code to ‘do all things necessary to carry out the spirit and intent of the provisions of this act. . . .’” *Id.* (quoting *Idaho Code* § 61-501). In TWCIS’ view, the Commission should take into account TWCIS’ need to obtain a CPCN in order to interconnect with incumbent providers and then assess whether the law allows the Commission to grant the requested authority. *Id.* at 4.

TWCIS also claims that the Commission has in the past granted CPCN applications of “similarly situated carriers” – citing Eltopia Communications LLC and ALEC Telecom, Inc. as contemporary examples. *Id.* According to TWCIS, there is “no conceivable basis for distinguishing TWCIS’ Application from these carriers’ applications.” *Id.* at 5. Dissimilar treatment of TWCIS’ Application would be deemed discriminatory and “cannot be justified and would not be sustained by any court of law.” *Id.*

TWCIS also argues that Titles 61 and 62 of the Idaho Code must be read in conjunction with the admonition found in Section 253 of the federal Act which states that “[n]o State or local statute or regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” *Id.* Thus, according to TWCIS, Titles 61 and 62 should not be read in a manner that “would thwart a competitive carrier’s ability to enter the Idaho market by interconnecting with incumbent carriers. . . .” *Id.*

Moreover, the Company argues that “the strongly pro-competitive principles of federal and state law counsel against any such reading.” *Id.* TWCIS reiterates that it is seeking a CPCN in order “to exercise its federally conferred rights as a competitive local exchange carrier, including in particular the right to obtain interconnection. . . .” *Id.* at 6.

Finally, the Company presents an alternative argument that, if its Application is denied, the Commission issue an order clearly stating that TWCIS may interconnect with incumbent LECs in Idaho and operate as a wholesale telecommunications carrier without a CPCN. *Id.* Absent such an order, the Company claims that it would be subject to “arbitrary and capricious treatment vis-à-vis wholesale providers that have obtained a CPCN from this Commission.” *Id.*

COMMISSION DECISION

Does the Commission wish to approve TWCIS’ Application for a Certificate of Public Convenience and Necessity?



Neil Price
Deputy Attorney General